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8
9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF NEVADA**

11 CALVARY CHAPEL LONE MOUNTAIN,
a Nevada Non-profit Organization

12 Plaintiff,

13 vs.

14 THE HONORABLE STEPHEN F.
15 SISOLAK, in his official capacity as
Governor of Nevada, et al.,

16 Defendants.

Case No. 2:20-cv-00907 RFB-VCF

17 **OPPOSITION TO PLAINTIFFS' EMERGENCY**
18 **MOTION FOR PRELIMINARY INJUNCTION**
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1 Defendants Steve Sisolak, in his official capacity as the Governor of Nevada and
2 Aaron D. Ford, in his official capacity as Attorney General of Nevada, and Justin Luna, in
3 his official capacity as Chief of the Nevada Division of Emergency Management (collectively
4 “Defendants”) hereby oppose Plaintiff Calvary Chapel Lone Mountain’s (“Plaintiff” or
5 “Calvary”) Emergency Motion for Preliminary Injunction.

6 This opposition is made and based upon all matters of record herein, the
7 Memorandum of Points and Authorities submitted herewith, and upon such oral
8 arguments as the court may allow at the time of hearing of this matter

9 DATED this 3rd day of June, 2020

10 AARON D. FORD
11 Attorney General

12 By: /s/ Craig A. Newby
13 CRAIG A. NEWBY (Bar No. 8591)
14 Deputy Solicitor General
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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Nevada, like all other states, has declared an emergency to protect lives from the COVID-19 global pandemic. Following scientific evidence and federal guidelines, Nevada has implemented social distancing to protect Nevadans from COVID-19 to mitigate the risk of exposure and spread. Social distancing involves, among other things, the distance between people and the length of time people are exposed to each other. To minimize the risk of transmitting COVID-19, social distancing requirements for larger gatherings where people congregate together for extended periods of time need to be different than requirements for individuals to engage in commerce. Nevada's actions have "flattened the curve," and efforts continue to reopen the state slowly to ensure that the economic sacrifices made to achieve this were not in vain. The reopening effort included Directive 021, issued last Thursday, providing that religious organizations could begin conducting services (including Sunday), under similar limitations placed on other mass gatherings and live entertainment events.

Here, Plaintiff Calvary Chapel Lone Mountain ("Plaintiff" or "Calvary") seeks a preliminary injunction remedying an alleged "violation of the free exercise clause" and "guarantees [for] religious freedoms." ECF No. 11-1 at ¶ 3 (Decl. of Pastor Jimmy Morales). It does so because Calvary believes churches that congregate people together for extended periods of time should be treated the same as commerce.

Last Friday, the United States Supreme Court denied an injunction for a church that also sought to open last Sunday May 31, 2020. There, as set forth below, the Supreme Court recognized that social distancing is different for mass gatherings than for commerce, and that there is a rational basis for this distinction.

For this reason and the others set forth below, Calvary is unlikely to succeed on the merits in this case. For the foregoing reasons, the motion must be denied.

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II. BACKGROUND

A. The Global Pandemic

In January 2020, China identified a novel coronavirus causing what we now know as COVID-19. Sui-Lee Wade and Donald G. McNeil, Jr., *China Identifies New Virus Causing Pneumonialike Illness*, N.Y. TIMES (Jan. 8, 2020), <http://www.nytimes.com/2020/01/08/health/china-pneumonia-outbreak-virus.html>. Less than three months later, on March 11, 2020, the World Health Organization (“WHO”) declared COVID-19 to be a pandemic. *See* WHO Director-General’s Opening Remarks (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>. The WHO “called ... for countries to take urgent and aggressive action” *Id.* The White House similarly declared an emergency on March 13, 2020. <https://whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>. Upon information and belief, each state has declared an emergency as a result of COVID-19.

Despite this urging, COVID-19 spread quickly across the United States. To date, more than five million people worldwide have been diagnosed as infected with COVID-19. *See* Johns Hopkins Medical Center: Coronavirus Resource Center, COVID-19 Map (last visited May 27, 2020), <https://coronavirus.jhu.edu/map.html>. Approximately 30% of those diagnoses are in the United States. *Id.* More than three hundred fifty thousand people have died worldwide, of which approximately one hundred thousand are Americans. *Id.* There currently is no vaccine.

Based on how COVID-19 is spread, the CDC recommends that everyone practice social distancing. According to the Centers for Disease Control and Prevention (“CDC”), “[l]imiting face-to-face contact with others is the best way to reduce the spread of coronavirus disease 2019 (COVID-19).” *See* CDC Coronavirus Disease 2019, Social Distancing (last accessed May 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>. To practice social or physical distancing,

the CDC recommends that people do not gather in groups, stay out of crowded places, and avoid mass gatherings. *Id.* The CDC further recommends avoiding “gatherings of any size outside your household.” *Id.*

Simply put:

When it comes to gatherings, the risk is not just based on how many people there are, but rather how closely they are gathered and how they are interacting with each other. The risk does not disappear in smaller gatherings. It’s the distance and precautions that will make the difference.

See Social Distancing (last accessed May 27, 2020), <https://nvhealthresponse.nv.gov/info/event-organizers/>.

Consistent with this practice, the White House issued guidance intended to slow the spread of COVID-19, including recommendations that all people avoid social gatherings of more than ten people and that indoor/outdoor venues, where groups of people congregate and there is evidence of community transition, close. *See* The President’s Coronavirus Guidelines for America, 30 Days to Slow the Spread (Mar. 31, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf. Even now, according to Phase Two of the White House’s “Opening Up America Again” guidelines, “[s]ocial settings of more than 50 people, where appropriate distancing may not be practical, should be avoided unless precautionary measures are observed.” White House, Opening Up America Again (last accessed May 27, 2020), <https://www.whitehouse.gov/openingamerica/>.

Simply put, COVID-19 remains a clear, present danger to the United States, Nevada, and the world.

B. Nevada’s Response to the Global Pandemic

Given the recommendations of the WHO and the CDC, Governor Sisolak declared a state of emergency on March 12, 2020.¹ He did so pursuant to his authority under the laws and constitution of the State of Nevada to contain the spread of COVID-19.

¹ Defendants request that the Court take judicial notice of Nevada’s emergency declaration and subsequent directives pursuant to Fed. R. Evid. 201.

1 Nevada law defines an “emergency” as:

2 [A]n occurrence or threatened occurrence for which, in the
3 determination of the Governor, the assistance of state agencies
4 is needed to supplement the efforts and capabilities of political
5 subdivisions to save lives, protect property and protect the health
6 and safety and persons in this state, or to avert the threat of
7 damage to property or injury to or the death of persons in this
8 state.

6 NRS 414.0345. Under NRS 414.035, emergency management is “the preparation for and
7 the carrying out of all emergency functions, . . . , to minimize injury and repair damage
8 resulting from emergencies or disasters caused by . . . natural causes.” *Id.*

9 Subsequently, Governor Sisolak issued a series of emergency directives to mitigate
10 community spread of COVID-19 and provide a framework for social distancing consistent
11 with CDC guidelines as well as best practices adopted by the majority of other states. To
12 the extent Calvary contends that the most recent directive violates its constitutional rights,
13 it shall be reviewed in more detail.

14 **C. Directive 21 Treats Religion the Same or Better than Other Mass** 15 **Gatherings**

16 Directive 021 implements Phase 2 of Nevada’s reopening. A true and correct copy of
17 Directive 021 is attached hereto as **Exhibit A**. Detailed review shows how it treats
18 religious organizations relative to other social gatherings that are most similar to it in how
19 people congregate together and communicate.

20 **1. Mass Gatherings Generally**

21 Section 10 of Directive 021 addresses mass gatherings generally. It increases the
22 limit for mass gatherings to up to 50 people.

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27 _____
28 These documents are located on the Nevada Governor’s website at
http://gov.nv.gov/News/Emergency_Orders/Emergency_Orders/.

1 It specifically reads as follows:

2 SECTION 10: Section 1 of Directive 007 is hereby further
3 amended to provide that effective 12:01 am on May 29, 2020, the
4 Nevada general public shall not gather in groups of more than
5 fifty in any indoor or outdoor area subject to the limitations of
6 this section, whether publicly owned or privately owned where
7 the public has access by right or invitation, express or implied,
8 whether by payment of money or not. Section 3 of Directive 007
9 shall remain in force.

10 As alleged by Calvary, religious organizations are being treated the same as mass
11 gatherings of the general public.

12 **2. Numerous Other Venues Are Limited to No More than 50 People**

13 Directive 021 imposes limits to the lesser of 50% occupancy or 50 people to numerous
14 activities and venues within Nevada. These include:

- 15 • Non-retail indoor venues, such as movie theatres, bowling alleys, and arcades; (*see*
16 *id.* at § 20)
- 17 • Museums, art galleries, zoos, and aquariums; (*see id.* at § 30) and
- 18 • Trade schools and technical schools. *Id.* at § 32.

19 Further, Directive 021 maintains stricter limits on live performances of all types,
20 prohibiting spectators. Specifically, Section 22 states:

21 SECTION 22: Effective 12:01 am on May 29, 2020, musical
22 performances, live entertainment, concerts, competitions,
23 sporting events, and any events with live performances may
24 resume, but shall remain closed for public attendance. Events
25 held pursuant to this section may be recorded, filmed, streamed
26 or broadcast to the public. Live events ordinarily regulated by
27 the Nevada Athletic Commission or the Nevada Gaming Control
28 Board must be approved by the applicable board prior to the
event. All other live events under this Section must be approved
by the Nevada Department of Business & Industry, Division of
Industrial Relations prior to the event. Events held pursuant to
this Section must additionally comply with all guidance
promulgated by NV OSHA.

29 **3. Communities of Worship and Faith-Based Organizations**

30 With this context, it now makes sense to consider the provision Calvary contests.
31 Section 11 of Directive 021 addresses communities of worship and faith-based
32 organizations. Identical to mass gatherings generally and with equal treatment as to

1 numerous other gatherings, services are limited to fifty people. Specifically, this provision
 2 reads as follows:

3 SECTION 11: Communities of worship and faith-based
 4 organizations, including without limitation, churches,
 5 synagogues, mosques, and temples, are strongly encouraged to
 6 offer online and drive-up services to the greatest extent possible.
 7 Effective 12:01 am on May 29, 2020, consistent with other
 8 Directives on public gatherings, houses of worship may conduct
 9 indoor in-person services in a manner so that no more than fifty
 10 persons are gathered, and all social distancing requirements are
 11 satisfied. This limitation shall not apply to houses of worship
 12 offering drive-up services pursuant to Section 10 of Directive
 13 016. Houses of worship offering indoor, in-person services are
 14 encouraged to follow the guidelines promulgated by the LEAP,
 as well as the following provisions that are consistent with other
 Directives on public gatherings:

(1) Seating must be arranged to ensure a minimum of six feet
 of separation between congregants who do not reside in the same
 household.

(2) Participants, including leaders and staff, are encouraged
 to utilize face coverings to the greatest extent practicable.

(3) Houses of worship are encouraged to stagger services so
 that the entrance and egress of congregants for different services
 do not result in a gathering greater than fifty persons, and to
 provide proper sanitation between services.

15 Plain comparison of the Directive 021 provisions highlights the same treatment for
 16 similar types of gatherings, premised on their relatively higher risk of COVID-19
 17 transmission. It is rational and warranted as Nevada continues to ensure safety, which
 18 will allow its person-based tourism economy to recover and succeed again. Complaints that
 19 mass gatherings must be treated the same as commerce, which involves entirely different
 20 lengths and types of person-to-person contact, have been rejected by numerous courts
 21 through the United States, including the Supreme Court and the Ninth Circuit, and must
 22 be rejected here.

23 **D. Plaintiff's Allegations**

24 Calvary filed its complaint on May 20, 2020. ECF No. 1. In paragraph one of its
 25 complaint, Calvary alleges that it “was ordered to cease all gatherings at their locations
 26 and bring this action as themselves and on behalf of parishioners for violations of their
 27 Free Exercise Clause guaranteed by Amendment I of the United States Constitution and
 28 other violations.” *Id.* While Section (1)(c) of the Prayer for Relief seeks declaratory relief

for “places of worship,” the sole federal claim for relief asserted within the Complaint referencing religion is Calvary’s Third Claim for Relief, titled “Violation of the Equal Protection Clause of the Fourteenth Amendment.” *Id.* at 24:22-26:10; 31:1-11. The Sixth Claim for Relief references Nevada’s equivalent to the federal “Free Exercise Clause,” but it is not asserted by Calvary as a federal claim. *Id.* at 27:22 – 28:20. There are no other First Amendment claims asserted within the Complaint.

Calvary filed this motion on May 21, 2020. ECF No. 11. The legal argument focuses almost entirely on a federal Free Exercise Clause claim that Calvary has not filed in this case. Further, Calvary did not specifically state what it wants injunctive relief to do. Accordingly, in light of Directive 021, this Court ordered Calvary to submit a supplement identifying the specific injunctive relief it wants. ECF No. 13.

Instead of identifying the specific injunctive relief desired, Calvary concludes that “the Court should enter a preliminary injunction from enforcement of Emergency Directives 20-003 et seq. or any matter impacting Plaintiffs constitutional interests that precludes their ability to participate in places of worship as it does in secular businesses” and adopt “guidelines substantiated by empirical data and guidelines based on fire code restrictions rather than the ad hoc mandates issued on the basis of random numbers unsupported by any data.” ECF No. 15 at 17:2-9. The specific relief that Calvary wants the Court to enter is still not clear.

Further, instead of addressing Directive 021’s actual language as instructed by this court, Calvary makes an incomprehensible claim that Defendants’ inability to stop protests related to the death of George Floyd specifically and police brutality generally constitutes disfavoring religion. *See generally* ECF No. 15 at 9:14-11:6. Because local authorities did not stop hundreds (if not thousands) of protesters from violating social distancing requirements, Calvary contends that this makes such policies unenforceable against them.²

² Calvary wrongly asserts that Defendant Ford threatened Calvary’s pastor or congregants with arrest. *Id.* at 11:3-7. This is simply not true. Subsequently, one attorney for Calvary attempts to argue her interpretation of a conversation to which she was not a party. *See* ECF No. 16. This is hearsay and a non-retraction retraction of the false statement. In any event, the sole relevance any of it has to the motion is further

1 This is ridiculous and purported discrimination on the basis of the content of a
2 communication is not a claim asserted by Calvary in this case.

3 Calvary's inability to get its allegations and claims straight further warrant denial
4 of this motion.

5 **III. LEGAL STANDARD FOR INJUNCTIVE RELIEF**

6 To obtain a preliminary injunction, Calvary must demonstrate that (1) they are
7 likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence
8 of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is
9 in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This
10 traditional test applies absent Plaintiff's ability to demonstrate that the balance of equities
11 tips sharply in their favor. *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1066 n.2
12 (9th Cir. 2014).

13 Calvary cannot meet this burden because they are unlikely to succeed on the merits
14 of their claim. Further, Calvary cannot demonstrate irreparable harm, as nothing prevents
15 them from offering additional services if necessary to accommodate all congregants.

16 Finally, the balance of equities and the public interest during these unprecedented
17 times weigh heavily against injunctive relief. Nevada is in the midst of an extended public
18 health emergency. Its efforts to mitigate the spread of COVID-19 to avoid overwhelming
19 health resources have worked thus far. Temporary, narrowing restrictions on the size of
20 mass gatherings, including for religious services, do not outbalance the health and well-
21 being of all Nevada citizens. In light of the tremendous uncertainty continuing to surround
22 this new and deadly virus, it would be rash to eliminate the entire restriction for this
23 certain type of mass gathering before public-health officials have had the opportunity to
24 evaluate evidence of the policy's effectiveness in practice.

25 The motion should be denied.

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27
28 demonstration of why the Constitution provides emergency police powers to the States,
rather than to unelected attorneys.

IV. LEGAL ARGUMENT

A. Calvary is Unlikely to Succeed on the Merits of its Claims

1. Calvary Lacks Standing to Bring this Claim

Article III, § 2 of the U.S. Constitution states that the federal courts may only adjudicate “Cases” and “Controversies.” *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). The case-or-controversy requirement of Article III requires that Calvary establish its “standing” as a jurisdictional prerequisite to the prosecution of this law suit. *Clapper v. Amnesty Int’l USA*, 586 U.S. 398, 408 (2013). To establish standing, Calvary must show that their alleged injury is “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (internal quotations and citations omitted). Injury in fact is “the ‘[f]irst and foremost’ of standing’s three elements.” *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (alteration in original) (*quoting Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)).

Additionally, Calvary must also show a “causal connection” between the alleged injury and the conduct about which they complain. *Id.* Further, Calvary may not offer mere speculation that a decision in their favor will redress their alleged injury. *Id.* at 561. Finally, Calvary must demonstrate standing separately for each form of relief sought. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

Here, Calvary asserts state law issues unrelated to their primary Free Exercise argument without allegations of whether or how it was injured and without legal authority for how this federal court has authority to order Nevada to comply with Nevada law. Calvary lacks standing to assert those claims before this court.

a. Calvary has not Suffered Any Injury-in-Fact for the State Law Arguments Asserted in this Motion

“An injury in fact is ‘an invasion of a legally protected interest which is: (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical.’” *Id.* “Plaintiffs must demonstrate a ‘personal stake in the outcome.’” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (*quoting Baker v. Carr*, 369 U.S. 186, 204 (1962)). “Abstract is not enough.” *Id.* at 102.

1 In addition to its arguments pertaining to the Free Exercise Clause, Calvary asserts
 2 additional legal arguments such as the regulatory process for adopting emergency
 3 regulations (Mot. at 17:1-19:3)³ and the purported suspension of open meetings laws (*id.* at
 4 19:4-27). This may be due to confusion by Calvary's counsel between this case and other
 5 federal court cases against the Governor's emergency directives.⁴ In any event, there are
 6 no allegations within this complaint that Calvary has been injured (in fact or at all) by
 7 these provisions. Accordingly, Calvary lacks standing to assert arguments against those
 8 provisions (as pled) and such claims should be dismissed by this court.

9 **b. Calvary's Claim Lacks Redressability**

10 Redressability is defined as "a likelihood that the requested relief will redress the
 11 alleged injury." *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 103 (1998). To
 12 demonstrate this prong, a plaintiff must show that it is "likely," as opposed to merely
 13 "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S.
 14 at 561. This inquiry requires a court to examine whether it is the effect of the court's
 15 judgment on the defendant – not an absent third party – that redresses the plaintiff's
 16 injury, whether directly or indirectly. *McDonald v. Dep't of Homeland Sec.*, No.
 17 205CV00909KJDRJJ, 2006 WL 8442921, at *2 (D. Nev. June 6, 2006) (quoting *Simon v. E.*
 18 *Ky. Welfare Rights Org.* 426 U.S. 26, 41-42 (1976).

19 Claims under 42 U.S.C. § 1983 provide redress for "the deprivation of any rights,
 20 privileges, or immunities secured by the Constitution and laws [of the United States]..."
 21 *Baker v. McCollan*, 443 U.S. 137, 140 (1979). In short, for Section 1983 claims, the Court
 22 can assess only alleged violations of federal constitutional rights. *Id.* This is for good
 23 reason. "[I]t is difficult to think of a greater intrusion on state sovereignty than when a
 24

25 ³ The Governor has the power to declare an emergency and to perform and exercise
 26 such functions, powers, and duties as are necessary to promote and secure the safety and
 protection of the civilian population. NEV. CONST. art. 5, § 1; NRS 414.070.

27 ⁴ See *Capelli Milano, LLC et al. v. Sisolak et al.*, Case No. 2:20-cv-00827-APG-NJK
 28 (D. Nev. May 7, 2020); *Reno Academy of Conduct, LLC, et al. v. Sisolak et al.*, Case No.
 3:20-cv-00305-MMD-WGC (D. Nev. May 22, 2020). To undersigned counsel's knowledge,
 proper service has not been completed for any of these cases.

federal court instructs state officials on how to conform their conduct to state law.”
Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984).

Here, Calvary asserts three Nevada law claims against Nevada in federal court. Such claims are not properly before this Court and must be dismissed. This includes the sole claim associated with religion, as pled by Calvary.

This alone warrants denial of the motion.

2. The Exercise of Emergency Police Powers During a Public Health Crisis Warrants Additional Deference by a Court

Nevada’s power to regulate public health and safety, including the greater power of quarantine, predate the Constitution.⁵ The Supreme Court has recognized that the Constitution’s reserves power to the states to regulate public health, safety, and morals. *Gibbons v. Ogden*, 22 U.S. 1 (1824). The United States Supreme Court has explicitly upheld the exercise of broad quarantine powers by the states. *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*, 186 U.S. 380, 387 (1902).

More recently, though more than one hundred years ago, the Supreme Court established a framework governing the emergency exercise of state authority during a public health crisis. *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

Facing a compulsory vaccination law enacted during the smallpox epidemic, the Court described the state’s police power to combat an epidemic:

In every well-ordered society charged with the duty of conserving the safety of its members, the rights of the individual in respect to his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the public may demand.

Id. at 29.

There, the Court held that when a state exercises emergency police powers to enact an emergency public health measure, courts will uphold it unless (1) there is no real or

⁵ The earliest law providing for quarantine was enacted by the Massachusetts Bay Colony in 1647 to quarantine ships from the West Indies due to the threat of plague. Rothstein, Mark A., *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 Ind. Health L. Rev. 227, 230 (2015). The quarantine power was especially important in port cities, such as New York and Boston. *Id.*

substantial relation to public health, or (2) the measures are “beyond all question” a “plain palpable violation of rights secured by the fundamental law.” *Id.* at 30. This recognizes that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 28. As the Court explained, “[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.” *Jacobson*, 197 U.S. at 26-27. The Court further held that during public health crises, “it is no part of the function of a court ...to determine which of two modes was likely to be the most effective for the protection of the public against disease.” *Id.* at 30.

Courts throughout the past century have consistently applied *Jacobson* to public health emergencies. *See, e.g., Liberian Cmty. Ass’n of Connecticut v. Malloy*, 2017 WL 4897048, at *10 (D. Conn. Mar. 30, 2017) (applying *Jacobson* standard to Ebola quarantine); *Boone v. Boozman*, 217 F.Supp.2d 938, 954 (E.D. Ark. 2002) (applying *Jacobson* standard to compulsory school immunization); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (applying *Jacobson* framework stating the “[r]ight to practice religion freely does not include the liberty to expose the community. . . to communicable diseases”).

During the current global pandemic, courts have applied *Jacobson* as well. *See, e.g., In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020) (applying *Jacobson* framework to constitutional challenge to executive order by Texas Governor relating to COVID-19); *Elim Romanian Pentecostal Church et al. v. Pritzker*, Case No. 20-1811, 2020 WL 2517093 (7th Cir. May 16, 2020).

Last Friday, May 29th, the Supreme Court denied injunctive relief for a California church challenging California’s similar temporary restrictions on public gatherings in light of the COVID-19 crisis, reaffirming the applicability of *Jacobson*.⁶ *See South Bay United*

⁶ California’s restriction was the lesser of 25% of building capacity or a maximum 100 attendees. Such a restriction, applied to Calvary, would limit Calvary to approximately 45 people per service. *See* Mot. at 3:15-19. In short, the California order is more restrictive than Nevada’s emergency directive, yet the United States Supreme Court denied injunctive relief.

1 *Pentecostal Church, et al. v. Newsom, et al.* Case No. 19A1044, 2020 WL 2813056 at *1 (May
2 29, 2020), a true and correct copy of which is attached hereto as **Exhibit B**. There, the
3 Court rejected injunctive relief, consistent with the Ninth Circuit’s denial of injunctive
4 relief. *Id.*

5 To begin with, the Supreme Court noted the difference between mass gatherings and
6 commerce. Specifically, the Court stated that California’s restrictions “apply to comparable
7 secular gatherings, including lectures, concerts, movie showings, spectator sports, and
8 theatrical performances, where large groups of people gather in close proximity for
9 extended periods of time.” *Id.* The Court further noted that California’s restrictions are
10 more lenient for dissimilar activities, “in which people neither congregate in large groups
11 nor remain in close proximity for extended periods.” *Id.*

12 Next, the Supreme Court reaffirmed *Jacobson* and the discretion of state officials
13 such as Defendant to make emergency public health determinations. Specifically, the
14 Court noted that “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the
15 people’ to the politically accountable officials of the States ‘to guard and protect.’” *Id.*
16 (quoting *Jacobson*, 197 U.S. at 38). Further, the Court held that when “those officials
17 ‘undertake [] to act in areas fraught with medical and scientific uncertainties,’ their
18 latitude ‘must be especially broad.’” *South Bay*, 2020 WL 2813056 at *1 (quoting *Marshall*
19 *v. United States*, 414 U.S. 417, 427 (1974)). Finally, “[w]here those broad limits are not
20 exceeded, they should not be subject to second-guessing by an ‘unelected federal judiciary,’
21 which lacks the background, competence, and expertise to assess public health and is not
22 accountable to the people.” *Id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469
23 U.S. 528, 545 (1985)).

24 Under *Jacobson*, as reaffirmed by *South Bay*, Plaintiffs cannot prevail. First,
25 Calvary cannot establish that the emergency declaration and related directives have no
26 real or substantial relation to public health. More than one hundred thousand Americans
27 have died so far. Hospitals were overrun in Italy and New York City. Until there is a
28 vaccine, the primary method for preserving a “flattened curve” is social distancing. Social

1 distancing has been recommended by the World Health Organization, the CDC, and the
2 federal government. Reducing prolonged exposure warrants limitations on mass
3 gatherings, such as those set forth in Directive 021 for a variety of activities and venues,
4 specifically including faith-based organizations.

5 Moreover, and as set forth above, mass gatherings are different than commerce,
6 based on the length of time a person is exposed to others who may be infected with COVID-
7 19. The emergency declaration and subsequent directives have addressed this public
8 health risk. Similar to California's order at issue in *South Bay*, comparable secular
9 gatherings are subject to similar or more severe restrictions than places of worship, while
10 dissimilar commerce activities where people neither congregate in large groups nor remain
11 in close proximity for extended periods are treated more leniently.

12 Second, Calvary cannot establish that the emergency declaration and related
13 directives are "beyond all question" a "plain palpable violation of rights secured by the
14 fundamental law." To be sure, the free exercise of religion is constitutionally protected.
15 But as Supreme Court stated in *Prince v. Massachusetts*, the "[r]ight to practice religion
16 freely does not include the liberty to expose the community. . . to communicable diseases".
17 321 U.S. at 166-67.

18 In fact, Defendants submit that the emergency declaration and related directives
19 comply with the United States and Nevada Constitutions even if this was an ordinary
20 exercise of the State's police power, versus the emergency currently faced by the United
21 States, Nevada, and the world. Calvary's claims will be analyzed under those standards
22 below.

23 **3. The Directives do not Violate the Free Exercise Clause**

24 Under traditional analysis of the Free Exercise Clause, "neutral, generally
25 applicable laws" are subject to rational basis review, even where they are applied to
26 religious practices. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 (2014); *see also*
27 *Employment Division v. Smith*, 494 U.S. 872 (1990). In short, if the Orders do not target
28 religion, "the First Amendment has not been offended." *Employment Division*, 494 U.S. at

878. Because the Directives at issue in this case are neutral laws of general applicability, rationally based on the State’s goals of mitigating the spread and contraction of COVID-19, similar to what the Supreme Court determined to “appear consistent with the Free Exercise Clause of the First Amendment,” Plaintiffs’ claims fail.

a. The Directives are Generally Applicable

These orders are generally applicable. As the Supreme Court explained in *Lukumi*, although “[a]ll laws are selective to some extent, ...categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.” *Lukumi*, 508 U.S. at 542. Even “in pursuit of legitimate interests,” the government “cannot in a selective manner impose burdens only on conduct motivated by religious belief.” *Id.* at 543.

Calvary ignores the difference in type of assembly as the entities – both religious and secular – that are subject to the orders. Schools (to the extent open at all), live concert halls, movie theatres, and sports venues that wish to have spectators are burdened similarly to faith-based organizations. The places covered are places where “people sit together in an enclosed space to share a communal experience.” *Gish v. Newsom*, 2020 WL 1979970 (Apr. 23, 2020). The Governor has not selectively “impose[d] burdens only on “religious conduct, but rather equally on all types of conduct that are likely to spread COVID-19. See *Lukumi*, 508 U.S. at 543.

b. The Directives are Neutral

A law is not neutral if its object is to “infringe upon or restrict practices because of their religious motivation.” *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). A lack of neutrality can be clear from the face of the law if it “refers to a religious practice without a secular meaning discernable from the language or context.” *Id.* But the Free Exercise Clause also forbids “subtle departures from neutrality,” including evidence of bias that might not be reflected in the law’s text. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n.*, 138 S.Ct. 1719, 1731 (2018).

In determining if a law’s object is neutral, courts consider “the effect of [the] law in its real operation” and often call upon principles developed in equal protection cases.

1 *Lukumi*, 508 U.S. at 535, 540. Thus, a law will be found to violate the Free Exercise Clause
 2 if it was enacted “because of,” not merely “in spite of,” its restrictions on religious practice.
 3 *Id.* at 540. Relevant evidence on this point can include a proscription of religious activity
 4 in a way not applied to comparable secular activity; a “pattern” of “animosity” towards the
 5 religious group be the drafters; and the suppression of “much more religious conduct that
 6 is necessary” to achieve the asserted, legitimate purposes. *Id.* at 536, 542, 543.

7 Here, the Directives are plainly neutral. They prohibit all mass gatherings
 8 exceeding fifty people, whether general mass gatherings, religious services, movie theaters,
 9 or trade schools. They prohibit live entertainment venues from having any spectators.
 10 Calvary offers no facts suggesting that Governor Sisolak has any animus towards religious
 11 organizations. Moreover, churches remain free to conduct drive-in services, online
 12 programs, and in-person assemblies of up to fifty people, consistent with the White House’s
 13 Phase 2 guideline. Merely referencing religious activity separately as part of a list of
 14 broader mass gatherings covered by the fifty-person limit does not show that the order’s
 15 “object or purpose” was to target religious activity for harsher treatment. *Id.* at 533.
 16 Instead, the orders are designed to restrict only the aspects of the religious conduct – the
 17 large, in-person gatherings for extended time periods – that undermine the secular purpose
 18 of slowing the spread of COVID-19. This in no way suppresses “much more religious
 19 conduct that is necessary” to achieve the goal of mitigation and “flattening the curve”
 20 during the current pandemic.

21 Nevertheless, Calvary asserts that the orders are not neutral because religious
 22 organizations are being treated differently than businesses, such as “box stores, grocery
 23 stores, construction sites, etc.” Mot. at 22:1. However, in this Free Exercise analysis, the
 24 question is not whether any secular entity faces fewer restrictions than any religious one.
 25 To be comparable, the secular conduct must “endanger[] [the government’s] interests in a
 26 similar or greater degree than” the religious conduct. *Lukumi*, 508 U.S. at 543. And box
 27 stores, grocery stores, and construction sites, characterized by transiency and ..., simply do
 28 not pose the same amount of threat of exposure to and spread of COVID-19 as do religious

1 institutions that hold hours-long services with its congregants sitting in close proximity.
2 Such has been the finding in the majority of cases nationwide, which have rejected
3 challenges to similar orders.

4 The Supreme Court upheld this analysis in *South Bay United Pentecostal Church,*
5 *et al. v. Newsom, et al.* Case No. 19A1044, 2020 WL 2813056 at *1 (May 29, 2020). Prior to
6 the Supreme Court's consideration, the Ninth Circuit upheld the denial of a request for
7 injunctive relief tied to holding any in-person religious services pursuant to the State of
8 California and County of San Diego's stay-at-home orders. Case No. 20-55533, 2020 WL
9 2687079 (9th Cir. May 22, 2020). Similarly, the Seventh Circuit denied a request for
10 injunctive relief on a free-exercise claim against Illinois' emergency orders, recognizing that
11 the temporary numerical restrictions applied "also to the most comparable types of secular
12 gatherings, such as concerts, lectures, theatrical performances, or choir practices, in which
13 groups of people gather together for extended periods, especially where speech and singing
14 feature prominently and raise risks of transmitting the COVID-19 virus." *Elim Romanian*
15 *Pentecostal Church et al. v. Pritzker*, Case No. 20-1811, 2020 WL 2517093 (7th Cir. May 16,
16 2020). The Seventh Circuit further observed that "[w]orship services do not seem
17 comparable to secular activities permitted under the Executive Order, such as shopping, in
18 which people do not congregate or remain for extended periods." *Id.*

19 Two district courts within this circuit have likewise rejected Free Exercise
20 challenges to California's emergency orders. In *Cross Culture Christian Center et al. v.*
21 *Newsom*, the court recognized the difference between individuals purchasing various items
22 as different than in-person church services, which are designed to be a communal
23 experience, one for which a large group of individuals come together at the same time in
24 the same place for the same purpose. *See Cross Culture Christian Center et al. v. Newsom*,
25 Case No. 2:20-cv-00832-JAM-CKD, 2020 WL 2121111, at *6 (E.D. Calif. May 5, 2020),
26 (internal quotations omitted). Instead, the court found that in-person religious services are
27 more akin to attending concerts and sporting events. *Id.*

28 ///

1 Similarly, in *Gish v. Newsom*, the district court noted that “[a]n in-person religious
 2 gathering is not analogous to picking up groceries, food, or medicine, where people enter a
 3 building quickly, do not engage directly with others except at points of sale, and leave once
 4 the task is complete.”⁷ *Gish v. Newsom*, Case No. EDCV-20-755JGB (KKx), 2020 WL
 5 1979970, at *6 (C.D. Cal. Apr. 23, 2020).

6 In this context, where the Supreme Court has weighed in on substantively the same
 7 legal issue, Calvary’s reliance on *Maryville Baptist Church v. Beshear* is misplaced. 957
 8 F.3d 610 (6th Cir. 2020). There, the Sixth Circuit did not consider the differences between
 9 commerce and in-person church services, as did the Supreme Court, the Seventh Circuit,
 10 and the Ninth Circuit, before overturning the emergency order at issue. And in *Roberts v.*
 11 *Neace*, the Sixth Circuit actually stated that the “straightforward remedy” for addressing
 12 the in-person religious services risk was to “limit the number of people who can attend a
 13 service at one time.” 958 F.3d 409, *5 (6th Cir. 2020). Consistent with White House
 14 guidance, this is precisely what Nevada has done for *all* mass gatherings, including at
 15 churches. The Supreme Court has rejected this argument.

16 This court should reject this argument as well.

17 **3. The Directives do not Violate the Equal Protection Clause**

18 Calvary has asserted an Equal Protection claim in this case, without arguing its
 19 violation by Defendants in the motion for purposes of granting injunctive relief. Out of an
 20 abundance of caution, Defendants will address this claim.

21 The Fourteenth Amendment provides, in relevant part, that [n]o State shall ...deny
 22 to any person within its jurisdiction the equal protection of the laws.” “The general rule is
 23 that legislation is presumed to be valid and will be sustained if the classification drawn by
 24

25 ⁷ Other district courts have resolved Free Exercise challenges the same way. See,
 26 e.g., *Antietam Battlefield KOA v. Hogan*, No. CV CCB-20-1130, 2020 WL 2556496, at *7–9
 27 (D. Md. May 20, 2020); *Legacy Church, Inc. v. Kunkel*, Case No. Civ. 20-0327 JB/SCY, 2020
 28 WL 1905586 (D.N.M. Apr. 17, 2020); *Cassell v. Snyders*, Case No. 20 C 50153, 2020 WL
 2112374 (N.D. Ill. May 3, 2020); *Lighthouse Fellowship Church v. Northam*, Case No.
 2:20cv204, 2020 WL 2110416, at *8 (E.D. Va. May 1, 2020); *Calvary Chapel of Bangor v.*
Mills, Case No. 1:20-cv-00156-NT, 2020 WL 2310913, at *8 (D. Me. May 9, 2020); *Spell v.*
Edwards, 2020 WL 2509078 (M.D. La. May 15, 2020).

the statute is rationally related to a legitimate state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). This test is “highly deferential” to the government. *United States v. Hancock*, 231 F.3d 555, 566 (9th Cir. 2000). “The general rule give way, however, when a statute classifies by race, alienage, or national origin.” *City of Cleburne*, 473 U.S. at 440. No such claim is presented here.

Applying the rational basis test, Plaintiff’s Fourteenth Amendment claim fails. Calvary is not being treated differently than any other mass gathering that congregates people for an extended period of time. Limits on mass gatherings, which involve longer, more prolonged exposure to others who may be infected with COVID-19, are rationally related to reducing the spread of COVID-19. Keeping Nevadan citizens alive and healthy is a legitimate state interest. Calvary is unlikely to succeed on this claim.

Accordingly, strict scrutiny does not apply to Nevada’s emergency declaration and subsequent directives on this basis.

4. The Directives Comply with Rational Basis Review

Because the orders are neutral and generally applicable, Calvary has to show that they are unsupported by a rational basis to prevail. *See Burwell v. Hobby Lobby stores, Inc.*, 573 U.S. 682, 694 (2014). Given the State’s interest in limiting the spread of COVID-19, a highly contagious illness that spreads more easily through close contact, Calvary is unable to make such a showing.

Further, Calvary’s analysis as to why the emergency directives do not constitute the “least restrictive means” of furthering any compelling interest highlights why *Jacobson* and *South Bay* provide state officials with added discretion when exercising emergency police powers. It is not the place of Calvary, Calvary’s counsel, or this court to exercise discretion on where or how to protect public health against a novel, highly contagious virus.

Here, the Governor’s Orders were developed in response to an emergency situation. *Id.* at 543. Unlike the ordinance at issue in *Lukumi*, the Governor’s Orders do not “pursue the [State]’s governmental interests only against conduct motivated by religious belief.” *Id.* at 545. There were not “gerrymandered with care to proscribe religious” gatherings. *Id.* at

521. Rather, the Directives pursue the goal of slowing the spread of a deadly pandemic and saving lives by closing temporarily all places where more than fifty people might gather, subject to certain exceptions that are themselves designed carefully to preserve life, health, and livelihood. This specifically includes grocery stores to provide food allowing people to cook while staying at home. *Cf. id.* at 537.

The Governor's Orders are neutral and generally applicable. They are facially neutral, do not "target" religious establishments, and are not underinclusive. Again, "[t]he right to practice religion freely does not include liberty to expose the community ...to communicable disease...ill health or death." *Prince v. Massachusetts*, 312 U.S. 158, 166-67 (1944). For these reasons, Calvary is unlikely to succeed on the merits of its Free Exercise claim. This warrants denial of the motion.

B. Calvary is Unlikely to Suffer Irreparable Harm without an Injunction

Here, Calvary was already allowed to conduct in-person church services for up to 50 people a service, while continuing virtual services. Simply doubling the number of existing church services would allow Calvary to conduct in-person church services for its entire congregation. Particularly where these mass gathering requirements are generally applicable, there is no factual basis for concluding that Calvary has or will suffer irreparable harm.

C. The Balance of the Equities Favors Protecting Nevadans

To prevail on their Motion, Calvary must also show that the balance of the equities weigh in their favor. It does not.

"A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (internal citations omitted).

Here, Calvary presumes it should be treated the same as a business operating in commerce, ignoring the difference between commerce and mass gatherings for purposes of COVID-19 risk. The Supreme Court and the Ninth Circuit have rejected ignoring these

1 differences. In contrast, the Governor has an obligation to protect Nevadans' health and
 2 well-being, based on the risk. Consistent with White House guidelines for mass gatherings,
 3 the Governor has implemented directives to slowly reopen Nevada to ensure the curve stays
 4 flat and that there is not a need to revert back to earlier phases that required further
 5 sacrifices from all Nevadans to remain safe.

6 **D. Denying the Injunction Protects Nevadans from Worsened Risk of**
 7 **COVID-19**

8 Calvary must also demonstrate that the granting of its Motion is in the public
 9 interest. It is not.

10 "In exercising their sound discretion, courts of equity should pay particular regard
 11 for the public consequences in employing the extraordinary remedy of injunction." *Winter*,
 12 555 U.S. at 24. Similar to *Winter's* consideration of military interests, Nevada is currently
 13 in battle with the most significant public health emergency in over a century. To be clear,
 14 after the World Health Organization declared a pandemic, President Trump declared a
 15 nationwide emergency on March 13, 2020. See [http://www.whitehouse.gov/presidential-](http://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/)
 16 [actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-](http://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/)
 17 [disease-covid-19-outbreak/](http://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/). Governor Sisolak declared a Nevada emergency on March 12,
 18 2020. Both the state and federal emergencies remain in effect.

19 There is no genuine doubt that Nevada has the power to protect the health of its
 20 citizens, particularly in an emergency such as this. Prior to ratification of the Constitution,
 21 various colonies had quarantine laws, thereby establishing the legal tradition of local and
 22 state jurisdiction over matters of public health reflected in the Constitution's reservation
 23 of power to the states to regulate public health, safety, and morals. *Gibbons v. Ogden*, 22
 24 U.S. 1 (1824).

25 It is in this context that Calvary seeks to substitute its judgment of the public
 26 interest, seeking preference over any other mass gathering, for those representing us in
 27 the local, state, and federal government.

28 This prong strongly warrants denial of the motion.

1 **V. CONCLUSION**

2 Nevada has had a successful beginning to its fight to limit death and injury
3 associated with COVID-19. This Court should not substitute its judgment for that of the
4 Governor during this ongoing emergency, particularly where Calvary is unlikely to succeed
5 on the merits of any claim and has not actually asserted a federal Free Exercise claim.

6 The motion for preliminary injunction should be denied.

7 DATED this 3rd day of June, 2020.

8 AARON D. FORD
9 Attorney General

10 By: /s/ Craig A. Newby
11 CRAIG A. NEWBY (Bar No. 8591)
12 Deputy Solicitor General
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 3rd day of June, 2020, I electronically filed the foregoing document, **OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**, with the Clerk of the Court by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Kristalei Wolfe
Kristalei Wolfe, and employee of the
Office of the Attorney General

INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
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